Johnston v. One America Productions, Inc. et al Doc. 21

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ELLEN JOHNSTON PLAINTIFF

V. CIVIL ACTION NO.: 2:07CV42 WAP-EMB

ONE AMERICA PRODUCTIONS, INC.,
EVERYMAN PICTURES, TWENTIETH
CENTURY-FOX FILM CORPORATION
and JOHN DOES 1 AND 2 DEFENDANTS

DEFENDANTS' MOTION TO ALTER OR AMEND THE DISTRICT COURT'S ORDER DATED AUGUST 22, 2007 OR, IN THE ALTERNATIVE, TO CERTIFY THE ORDER FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b) AND ENTRY OF A STAY

Defendants One America Productions, Inc. and Twentieth Century Fox Film Corporation[1] move, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter or amend the District Court's Order dated August 22, 2007, granting in part and denying in part Defendants' Motion to Dismiss. In support, Defendants present the following:

1. Plaintiff Ellen Johnston alleges in her Complaint that Defendants One America Productions, Inc. and Twentieth Century Fox Film Corporation "invaded Plaintiff's privacy," "portrayed Plaintiff in a false light," "led [her] to believe that [Defendants'] camera crew was filming a 'documentary,'" and "had no authority to show her in the film *Borat*." She further alleges that "Defendants' gross negligence constituted willful, wanton, and reckless disregard to Ms. Johnston's right to privacy, for [their] own monetary profit," for which Plaintiff sought compensatory and punitive damages. Plaintiff's Complaint ¶ 4-7 (March 19, 2007).

[1] Plaintiff voluntarily dismissed Defendant Everyman Productions, Inc. See Notice of Dismissal (June 1, 2007); Docket 6.

Dockets.Justia.com

2. Defendants One America Productions, Inc. and Twentieth Century Fox Film Corporation moved to dismiss the Complaint in its entirety because the factual allegations failed to state a claim.[2] Defendants argued that Mississippi law recognizes four different privacy torts, and while the Complaint did not clearly articulate what type (or types) of privacy claims Johnston asserts, her Complaint failed to include the factual allegations necessary for recovery under any of the four privacy torts recognized in Mississippi when viewed in the light of the motion picture film itself. *See* Motion of Defendants' to Dismiss for Failure to State a Claim (June 20, 2007); Docket 7.

3. Plaintiff argued that the "basis for the Plaintiff's allegations against the Defendants is that her right to privacy has been invaded" and that the "court does not have to look beyond the allegations of the Complaint to determine that a cognizable claim is asserted both factually and legally for invasion of privacy." Plaintiff's Response to Defendants' Motion to Dismiss for Failure to State a Claim etc. at pp. 3, 13 (July 3, 2007). Nowhere in opposing Defendants' Motion did Plaintiff contend or suggest that her Complaint might survive Defendants' Motion because she had alleged a separate claim for gross negligence. *Id.*

4. The District Court granted in part and denied in part Defendants' Motion to Dismiss for Failure to State a Claim. Order (Aug. 22, 2007); Docket 18. The District Court dismissed Plaintiff's invasion of privacy claim premised upon intrusion upon seclusion and disclosure of private facts, but denied Defendants' Motion as to Plaintiff's invasion of privacy claim premised upon misappropriation of likeness for commercial gain and for false light. *Id.* ¶ 4-5. The District Court apparently read Plaintiff's demand for punitive damages

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[2] *See* Motion of Defendants' to Dismiss for Failure to State a Claim (June 20, 2007); Docket 7.

as a separate substantive claim rather than a remedy. Its Memorandum Opinion did not discuss how a "gross negligence" claim is cognizable under the facts alleged in the Complaint, but simply stated in the "Conclusion" that “defendants did not demonstrate that the plaintiff has failed to state a claim for gross negligence.” Memorandum Opinion 15.

5. The Order’s finding that the Complaint alleges a claim for gross negligence is a manifest injustice because the parties did not brief this issue. Nowhere did Plaintiff argue that she was asserting an independent substantive negligence claim. This finding also constitutes a clear error of law: Mississippi does not recognize claims for negligence based on a creative or communicative work, such as a movie, entitled to the full protection of the First Amendment. *E.g., Mitchell v. Random House, Inc.,* 865 F.2d 664, 672 (5th Cir. 1989) ("the only decisions [in Mississippi] that have held that a written publication could form the basis for an action based on negligence involve instances of commercial speech"); *accord, Pierce v. The Clarion-Ledger,* 433 F. Supp. 2d 754 (S.D. Miss. 2006), *aff'd*, 2007 WL 1191724 (5th Cir. 2007). Any plaintiff who attempts to recover monetary damages based upon an expressive work about a matter of genuine public interest such as the motion picture film before the District Court must under the First Amendment allege, among other essential elements, that the published work contains statements about the plaintiff that are false or that are made with a reckless disregard as to their truth or falsity. *See, e.g., Time, Inc. v. Hill,* 385 U.S. 374, 388-89 (1967); *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1229-34 (7th Cir. 1993). To hold otherwise is to permit juries or judges to punish the publishers of such works for their opinions and their editorial decisions, which the First Amendment prohibits. Since Plaintiff does not allege that the film contains any false statements about her image or likeness and Plaintiff did not dispute this point in opposing Defendants’ Motion To Dismiss,

any attempt to salvage her gross negligence claim by further amendment would be futile and should not be allowed. Accordingly, the Order should be amended to dismiss any gross negligence claim found on the face of the Complaint.

6. The Order's finding that the Complaint states a claim for false light invasion of privacy represents a substantial departure from established Mississippi law. Specifically, the District Court's Memorandum Opinion accompanying the Court's Order, without acknowledging numerous state and federal court decisions to the contrary, allows Plaintiff's *subjective* view of the portrayal of her in the film – what she "would believe others would believe" upon viewing the scene – to determine whether the portrayal is actionable. Further, the Opinion fails to mention or apply any of the substantive principles of Mississippi law that guide the courts in determining whether her false light claim is actionable.

7. In finding that the Complaint states a claim for commercial appropriation, the Order and accompanying Memorandum Opinion also contain clear errors of law in failing to distinguish commercial speech, that is, speech that proposes a commercial transaction, from communicative speech and in failing to recognize that the use of the crowd scene at the public religious worship meeting where Plaintiff appears is an editorial decision clearly protected by the First Amendment.

8. In the alternative, if the District Court denies Defendant's Motion to Alter or Amend the Judgment, the Defendants respectfully request that the District Court enter an order, pursuant to 28 U.S.C. § 1292(b), certifying this case for interlocutory appeal. Certification is appropriate because the District Court's Memorandum Opinion involves controlling questions of law about which there are substantial differences of opinions and an appeal from

the Order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

9. The District Court's opinion presents the following controlling questions of law about which there is a substantial ground for a difference of opinion:

> 1. Does Mississippi law recognize an independent claim for gross negligence based on a mass media creative work such as a motion picture film?
>
> 2. In a false light privacy claim based on non-commercial mass media publication such as a motion picture film, does Mississippi law impose a subjective or an objective standard for determining whether the portrayal reasonably conveys the meaning urged and whether that meaning is highly offensive to a reasonable person?
>
> 3. Is there an appropriation of Plaintiff's image for a commercial purpose from which Defendants derive a commercial or non-pecuniary benefit, or is the fleeting use of the Plaintiff's image in a public crowd scene incidental to the film and thereby protected either under Mississippi law or the First Amendment?

10. An early resolution of these issues would help conserve substantial resources of the federal courts and also avoid undue expense to the parties.

11. Defendants also rely on their accompanying Memorandum of Law, which is incorporated herein by reference.

WHEREFORE, Defendants One America Productions, Inc., and Twentieth Century Fox Film Corporation respectfully request that their Motion to Alter or Amend the August 22, 2007 Order be granted; that the Complaint be dismissed with prejudice and costs assessed to Plaintiff; in the alternative only, that the Court certify the Order for interlocutory appeal pursuant to 28 USC § 1292(b); that the case be stayed pending the Fifth Circuit's consideration of the Application for Leave to Appeal; and that they be granted any other general or special relief as may be appropriate.

THIS, the 5th day of September, 2007.

Respectfully submitted,

ONE AMERICA PRODUCTIONS, INC.,
AND TWENTIETH CENTURY FOX FILM CORPORATION

s/ John C. Henegan
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CERTIFICATE OF SERVICE

I, John C. Henegan, one of the attorneys for Defendants, hereby certify that I have this day filed the above and foregoing MOTION OF DEFENDANTS TO ALTER OR AMEND THE DISTRICT COURT'S ORDER DATED AUGUST 22, 2007 OR IN THE ALTERNATIVE, TO CERTIFY THE ORDER FOR INTERLOCUTORY APPEAL UNDER § 28 U.S.C. 1292(b) AND ENTRY OF A STAY with the Clerk of the Court via the Court's ECF System which served a true copy upon the following via the Court's ECF system:

William O. Luckett, Jr.
wol@lucketttyner.com

ATTORNEY FOR PLAINTIFF

SO CERTIFIED, this the 5th day of September, 2007.

s/ John C. Henegan
JOHN C. HENEGAN

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